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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~893~~ 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEWIS LANDES,
Counsel for Petitioner.

(35,024)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 893

THE VARIOUS ITEMS OF PERSONAL PROPERTY, DISTILLING EQUIPMENT AND OTHER ARTICLES LOCATED AT THE PREMISES OF THE WATERLOO DISTILLING CORPORATION, LOCATED AT 43 RACE STREET, IN THE VILLAGE OF WATERLOO, NEW YORK, AND OF WHICH AN ITEMIZED STATEMENT IS SET OUT HEREIN AND IMMEDIATELY FOLLOWING UNDER THE HEADING OF "SCHEDULE A", AND THE VARIOUS ITEMS OF REAL PROPERTY BELONGING TO THE WATERLOO DISTILLING CORPORATION, SENECA SOLVENTS & CHEMICAL CORPORATION, MAX REIN, AND FANNIE REIN, BEING SITUATE IN THE VILLAGE OF WATERLOO, NEW YORK, AND DESCRIBED AND SET FORTH HEREIN IMMEDIATELY FOLLOWING UNDER THE HEADING OF "SCHEDULE B", PETITIONERS.

THE WATERLOO DISTILLING CORPORATION, THE SENECA SOLVENTS & CHEMICAL CORPORATION, MAX REIN, FANNIE REIN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION.

LEWIS LANDES, the attorney for the petitioners above named, prays that a writ of certiorari issue to review

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the decree of the Circuit Court of Appeals for the Second Circuit entered in the above case on April 14th, affirming the decision of the District Court for the Western District of New York.

Questions Presented.

This case presents the following questions:

(1) Can the real and personal property of a distillery operating under a permit issued to it under the provisions of the National Prohibition Act to operate and conduct a distillery be ordered forfeited and destroyed for failure to pay taxes under the Internal Revenue Laws on denatured alcohol, which is tax free?

(2) Is there a conflict between the provisions of the National Prohibition Act and the Internal Revenue Laws, in relation to the forfeiture and destruction of real and personal property of a distillery, for alleged attempts to divert denatured alcohol which after denaturization is tax free?

(3) Have not the provisions of the National Prohibition Act in relation to industrial alcohol and the operation of distilleries under permits issued by the Prohibition Department under the Prohibition Act superseded the provisions of the Internal Revenue Law?

(4) Is Section 600-A of the Revenue Act applicable to the case at bar where the distilled spirits were not

diverted nor manufactured into any article used or intended for use as a beverage?

(5) Can Sections 3257 and 3281 of the Internal Revenue Laws be invoked?

(6) Are not Section 3257 of the Internal Revenue Laws, and Section 25, Title 2 of the National Prohibition Act, in direct conflict, and under the Willis-Campbell Act, a prosecution, if the two statutes conflict must be brought under the National Prohibition Act, which was not done in the proceeding at bar?

(7) Can the WATERLOO DISTILLING CORPORATION, having first been indicted and convicted for conspiracy to violate the provisions of the National Prohibition Act, be penalized under the provisions of the Internal Revenue Laws, or should not the Government have proceeded to condemn the real and personal property herein, under the provisions of the National Prohibition Act?

(8) Is not a criminal prosecution of the WATERLOO DISTILLING CORPORATION and its officers under the provisions of the National Prohibition Act, a bar to a subsequent proceeding to forfeit and condemn in a civil action under the Internal Revenue Laws?

(9) Is there a tax on denatured alcohol which is tax-free, and can there be a forfeiture for the alleged non-payment of a tax on alcohol, after it is actually denatured?

(10) The questions presented in this application are similar to the questions to be passed upon by this

Honorable Court, in *Anthony La Franca* vs. *United States of America,* writ allowed on May 5th, 1930.

(11) Can that part of the premises of a Distillery which premises is not bonded and which is not a part of the bonded distillery premises, be seized and forfeited under the Internal Revenue Laws, merely because it is owned by the same corporation which owns the bonded distillery premises?

Statutes and Regulations Involved.

Section 3214 of the Revised Statutes, is as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings. Provided, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

Section 3247 of the Revised Statutes, is as follows:

> "Every person who produces distilled spirits, or who brews or makes mash, wort or wash, fit for distillation or for the production of spirits, or who by any process of evaporization, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller."

Section 3257 of the Revised Statutes is as follows:

> "Whenever any person engaged in carrying on the business of a distiller defrauds or at-

tempts to defraud the United States of the tax on spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than $500, and be imprisoned not less than six months nor more than three years."

Section 3281 of the Revised Statutes is as follows:

"Every person who carries on the business of a distiller without giving bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months, nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title and interest therein of every such person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all

personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress, to or from such distillery, which shall be found in any such building, yard or inclosure, and all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

Section 600-A of the Revenue Act of 1918, as amended, is as follows (Section 245, Title 26, U. S. C. A.):

"S. 245. Tax on distilled spirits. There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the Internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. * * *

(4) On and after February 26, 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person

responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph."

The National Prohibition Act, Title II, c. 85, 41 Stat. 305, 307-311:

"SEC. 1. When used in Title II and Title III of this Act (1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 percentum or more of alcohol by volume which are fit for use for beverage purposes: * * *

* * * * * * *

(7) The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations (U. S. C., Title 27, Sec. 4.).

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented (U. S. C., Title 27, Sec. 12).

* * * * * * *

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent and proprietary medicines that are unfit for use for beverage purposes.

* * * * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor * * * (U. S. C., Title 27, Sect. 13)."

Title III, Section 1 of the National Prohibition Act, provides as follows:

"SEC. 1. When used in this title—the term 'alcohol' means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or whatever processes produced. The term 'container' includes any receptacle, vessel, or form of package,

tank, or conduit used or capable of use for holding, storing, transferring, or shipment of alcohol."

Statement.

The WATERLOO DISTILLING CORPORATION, a New York domestic corporation, had received permits from the Prohibition Authorities of the United States, to operate a distillery, for the manufacture of pure alcohol, and to conduct a denaturing plant, for the purpose of denaturing tax free alcohol. The Distillery had filed with the Government Surety Bonds to the extent of Three Hundred Thousand ($300,000.00) Dollars.

In the case at bar there is no charge that the Distillery diverted pure grain alcohol. It is conceded that the pure alcohol manufactured by the distillery was actually denatured and poisoned, in conformity with Regulations.

Denatured alcohol is defined in the Regulations promulgated by the Treasury Department, as follows: (Regulations No. 61, Revised July, 1925, p. 81.)

> "Art. 88. Denatured alcohol is ethyl alcohol to which has been added such denaturing materials as render the alcohol unfit for use as an intoxicating beverage. It is free of tax and is solely for use in the arts and industries."
>
> * * * * * * *
>
> "Specially denatured alcohol is ethyl alcohol so treated with denaturants as to permit of its use in a greater number of specialized arts and

industries than completely denatured alcohol. The character of the denaturant or denaturants is such that it may be sold, possessed, and used only pursuant to permit and bond except as otherwise provided herein."

"Art. 89. Alcohol may be withdrawn free of tax for denaturation in an approved denaturing plant as hereinafter provided. Rum must be denatured in accordance with the provisions of Regulations No. 30."

In September of 1928, the United States of America filed a libel of information through the United States Attorney, for the Western District of New York, praying for the seizure and condemnation of certain articles, materials, personal property and real property.

An answer was interposed on behalf of the Petitioners herein.

The trial of the issues raised by the pleadings began on December 13th, 1928, before the Honorable Simon L. Adler and a Jury. The verdict of the Jury was rendered on December 21st, 1928.

The petitioners appealed to the Circuit Court of Appeals for the Second Circuit from the judgment, and on the 14th day of April, 1930 the Court consisting of Circuit Judges Martin Manton, Thomas W. Swan and Augustus N. Hand, rendered a judgment affirming the decree of the Court below. A copy of the opinion is attached to the record submitted herewith.

An order has been granted by the Circuit Court directing that the issuance of the mandate be stayed

pending the hearing and determination by this Court of this application for a writ of certiorari.

A certified copy of the record in the court below accompanies this petition.

Your petitioners are advised by their counsel and verily believe that this case presents questions of law which, because of their national importance, should be passed upon by this Honorable Court.

Specification of Errors.

The Circuit Court of Appeals erred—

(1) In holding that the seizure of the real and personal property of the distillery was legal.

(2) In holding that there was a tax payable under Section 600-A of the Revenue Act of 1918 as amended, on denatured alcohol.

(3) In holding that the tax imposed is not in reality a penalty, and therefore within the provisions of Sections 3257 and 3281 of the Revised Statutes, contrary to Lipke *v.* Lederer, 259 U. S., 557.

(4) In holding that Sections 3257 and 3281 of the Internal Revenue Laws are not in direct conflict with Section 25 and Section 22 of Title 2 of the National Prohibition Act.

(5) In holding that the conviction of the WATERLOO DISTILLING CORPORATION upon a charge of conspiracy to violate the National Prohibition Act, does not oper-

ate as a bar to a further prosecution for forfeiture under Sections 3257 and 3281, in the form of a libel.

Reasons for Granting the Writ.

(1) That the case at bar is identical with the case to be passed upon by this Honorable Court, namely, Anthony La Franca *v.* United States of America, writ of certiorari being allowed on May 5th, 1930.

(2) That this is the first time since the enactment of the National Prohibition Act, that a distillery operating under a permit granted to it under the provisions of the National Prohibition Act, will have its property destroyed and seized for failure to pay a tax on denatured alcohol, which under the Law is tax free, and upon which the Government is not entitled to a tax.

(3) That the National Prohibition Act has superseded the Internal Revenue Laws, insofar as they apply to the forfeiture of distilleries and the seizure of its property.

(4) That the part of the premises of the distillery, not used for distillery purposes and not bonded, should not have been ordered forfeited and seized.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit in the above case should be granted.

LEWIS LANDES,
Solicitor for Petitioners.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

LEWIS LANDES, being duly sworn, deposes and says that he is the attorney for the petitioners named herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

LEWIS LANDES.

Sworn to before me this 12th day of May, 1930.

BENJAMIN R. JHUNES,
Notary Public, Kings County.
Kings County Clerk's No. 670, Reg. No. 1321.
New York Co. Clerk's No. 1069, Reg. No. 111700.
Term expires March 30, 1931.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The case was tried in the District Court, before a Jury. The opinion of the Circuit Court of Appeals has not yet been reported (R. 324).

Statement.

A statement of the case, the questions presented, and the statutes and regulations involved, will be found in the petition.

ARGUMENT.

I.

The libel should be dismissed on the grounds that Section 600-A of the Revenue Act is not applicable because no distilled spirits were diverted nor manufactured into an article used or intended for use as a beverage.

The WATERLOO DISTILLING CORPORATION was a New York corporation legally engaged in the business of operating a Distillery under a permit granted to it by the Prohibition Authorities.

It is the contention of the Government, that this corporation had attempted to defraul the United States of the tax provided by law on distilled spirits,

in that it failed to pay the tax at the beverage rate of $6.40 per proof gallon on distilled alcohol, as provided by Section 600-A of the Revenue Act of 1918, and that in view of this fact, all the property of the Distillery should be forfeited under Section 3281 as set forth in count one of the libel and Section 3257 as set forth in count two of the libel.

The Distillery is not accused of diverting pure alcohol, but that the Distillery after having manufactured the pure alcohol, did transfer it to the denaturing plant where it was actually denatured, and that thereafter, it is the position of the Government, the Distillery sent out of its plant specially denatured alcohol, when according to its books and records it was supposed to have completely denatured the alcohol.

The Chemists who testified in behalf of the Government, said that the analysis which they made of the exhibits in the case, showed it to be specially denatured alcohol number 40 (fols. 404-408).

Denatured alcohol is defined by Regulations No. 61 promulgated by the Treasury Department, revised July, 1925. (See page 9 herein.)

The procedure adopted by the Government, insofar as the operation of denaturing plants are concerned, are also set forth in Regulations 61 heretofore described.

The theory upon which this libel proceeding is brought, is that the WATERLOO DISTILLING CORPORATION defrauded, or attempted to defraud the Government of the *tax* on distilled spirits as provided in the Statute. The question to be determined, is whether

there is a tax on alcohol after it has been converted into denatured alcohol.

The section relied upon by the Government is Section 600-A (Section 245 U. S. C. A., Title 26), of the Revenue Act of 1918, as amended.

The tax referred to in this section is a tax on distilled spirits only. *Denatured alcohol is not a distilled spirit.* There is no tax on the article which is referred to in the section. Specially denatured alcohol which was manufactured, in the case at bar, was not a beverage. This is conceded by both parties, and the District Court so charged the Jury (p. 261).

The District Court (fols. 783-784) said, in speaking to the Jury:

> *"In arriving at your conclusion on that point, I call your atention to the fact that there is no direct evidence in this case that any particular bit of this alcohol that went out of that plant was diverted to some particular place, and at that particular place used for beverage purposes."* (Italics ours.)

1. It is therefore conceded, that the distilled spirits, as such, were not diverted.

2. It is further conceded that the WATERLOO DISTILLING CORPORATION did not manufacture "any article" which could be used as a beverage, as such, so that up to this point, in interpreting Section 600-A, the section is not applicable to the case at bar. It is conceded that denatured alcohol cannot be used as a beverage, as such. So the Government Chemist testified—so the Regulations provide. Specially denatured

alcohol is not potable as a matter of law. *Higgins* vs. *Foster et al.*, 12 Fed. (2d) p. 646. In deciding the *Higgins* vs. *Foster* case, the Court said in part:

> "It is true that it uses the word 'alcohol', but that especially in its context precludes denatured alcohol, which is not potable."

In this case, the only "article" manufactured by the distillery, was specially denatured alcohol number 40 (this is conceded by the Government) and that cannot be used *as such*, for beverage purposes, or as a beverage.

There is of course, no tax at all, on specially denatured alcohol. If any tax at all, is applicable in this case, it is only on the distilled spirits, but as has been stated, the tax on the distilled spirits contained in the specially denatured alcohol, cannot apply to this case, because the specially denatured alcohol cannot be used as such, nor intended for such, as a beverage.

If the section made reference to the article manufactured or produced, or any other liquid or article made from such article, then probably the tax would apply. But they speak specifically "of the article" which is used, or "the article" which is intended for use as a beverage, as such. No reference is made to the possibility of recovering the distilled spirits from the article manufactured. Section 3047 applies to such a situation and 3047 is not mentioned in the case.

The apparent intention of the section is, to levy a tax upon an intoxicating liquor and not upon an article

which is not intoxicating. In the case at bar, denatured alcohol is not intoxicating.

Intoxicating liquor is defined in the National Prohibition Act, Section 1, Title 2:

> "When used in Title 2 and Title 3 of this Act, (1) the word 'liquor' or the phrase, 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." * * *

The Circuit Court of Appeals in *Higgins* vs. *Foster*, *supra*, stated:

> "Section 6 uses the word 'liquor' which is defined by Section 1 of Title 2, and which seems to us clearly to be confined to beverages. It is true that it uses the word 'alcohol', but that, especially in its context, precludes denatured alcohol, which is not potable." * * *

Further proof that Sub-division 4 of Section 600-A relied upon in the libel was enacted for the purpose of taxing only intoxicating beverages and not any other alcohol, such as specially denatured alcohol, can be seen from the date of the amendment, to wit, February 26th, 1926.

Section 3047 of the Revised Statutes (Section 485, Title 26, Internal Revenue Law) covers such a situation.

Section 3047 provides that

> "any person * * * who shall recover or attempt to recover by redistillation or by any other process or means, any alcohol rendered unfit for beverage or liquid medicinal purposes under the provisions of this section * * * shall on conviction of each offense be fined no more than $5,000.00 * * * and shall in addition forfeit to the United States, all personal property used in connection with his business, together with the buildings and lots or parcels of ground constituting the premises on which such unlawful acts are performed or permitted to be performed."

However, Section 3047 is not mentioned in the libel and is not the basis for the forfeiture. The libel does not state, nor is there any proof in the record, that a recovery or an attempt to recover was made of the alcohol which was contained in the denatured alcohol. If Section 600-A provided for tax in those instances where a recovery or an attempted recovery of the distilled spirit was made, it would have so explicitly stated. It cannot be implied. The proof that Section 600-A was not intended to apply to such a situation is found in the fact that another Section, to wit, 3047, provides for punishment in those instances where a recovery or an attempted recovery is made of the distilled spirit by redistillation or other process.

II.

Sections 3257 and 3281 of the Internal Revenue Laws cannot be invoked for the reason that there is no tax on the articles referred to in those sections as applied to this case.

The Word "Tax" Means Penalty.

The National Prohibition Act specifically provides that denatured alcohol is not taxable (Section 4, N. P. A., Title 2). The purpose of the National Prohibition Act was to prevent illicit manufacture and sale of intoxicating liquor. It is not an Act for the purpose of raising revenue. There is no tax on denatured alcohol even if it is intended for beverage purposes. If there is no tax attached to denatured alcohol, there could be no fraud of revenue, and Sections 3281 and 3257 could not be invoked. Those sections are repealed by the National Prohibition Act.

In the case of *United States* against *2,000 cases of whiskey*, etc., in October, 1921 (277 Fed. p. 410), the Court held that the Eighteenth Amendment of the National Prohibition Act completely changed the policy of the United States, and decided that Section 3453 of the Revised Statutes of the United States could not be invoked for the purpose of bringing a libel proceeding on the grounds of alleged fraud of Internal Revenue, because there was no revenue of which the Government could be defrauded. The Circuit Court of Appeals said in part:

> "We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes, but being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes, it has elected its own machinery (as listed in Section 25, *supra*, and Title 2, Sec. 29), to accomplish the desired result.
>
> We are therefore of the opinion that Section 3453 has been repealed and hence the decree below should be affirmed."

The libel was dismissed.

Since this case was decided, the Willis-Campbell Act sought to reenact all prior Internal Revenue Laws regarding taxes on intoxicating beverages not inconsistent with the National Prohibition Act. Assuming then, that Section 600-A does permit a tax on intoxicating beverages, counsel urges that the tax referred to in said section is a penalty, and if it is a penalty, there is no fraud of revenue and again Sections 3257 and 3281, which provide for forfeiture in the event of fraud of revenue, cannot be invoked. This Court in *Lipke* vs. *Lederer*, 259 U. S., p. 557, said:

> "The mere fact that the Statute uses the word tax, does not make it a tax if from the general nature and intention of the Statute it is seen that a penalty is meant."

Whether or not the word "tax" means a penalty, depends upon whether or not the Statute is a punitive measure. In that case a so-called tax was levied on a

violator of the National Prohibition Act, under Section 35 of that Act, which provides for a double tax with an additional penalty of $500.00 on retail dealers, and a thousand dollars on manufacturers who violate any of the terms of the National Prohibition Act. An attempt was made to forfeit the property, both real and personal, of the defendant, unless the tax imposed was paid.

Lipke, who was charged with violation of the National Prohibition Act, filed a bill and sought an injunction preventing the proposed action of the Government to confiscate his property, and the Supreme Court of the United States in deciding the question, held that the mere use of the word "tax" is not enough to show that within the true intendment of the term, a tax was laid, when by the very nature of the imposition a penalty was meant.

In *Regal Drug Corporation* vs. *Wardell*, 260 U. S. 387, the Court said:

> "Since the decision of the Circuit Court of Appeals we have decided a case which is a necessary factor to be considered (Referring to *Lipke* vs. *Lederer*, quoted supra). * * *
>
> The distinction between a tax and a penalty was emphasized. The function of a tax, it was said, 'is to provide, for the support of the Government'; the function of a penalty clearly involves the 'idea of punishment for infringement of the law; and that a condition of its imposition is notice and hearing.'"

Section 608 (Section 506, Title 26, Internal Revenue) provides for a tax of $6.00 for every barrel of

fermented liquor brewed, manufactured, sold or removed for consummation or sale. In construing that section which was also reenacted by the Willis-Campbell Act in November, 1921, it has been held that the word "tax" mentioned in said section, means penalty. *U. S.* vs. *American Brewing Co.*, 296 Fed. 772, decided in 1924; *U. S.* vs. *2,615 Barrels*, 1 Fed. (2d) 500, decided in 1924.

In *U. S.* vs. *American Brewing Co., supra*, the Court said in part:

> "We are clearly of opinion that for several reasons the provisions of the Internal Revenue Laws do not apply to any of these cases, and these libels and search warrants must stand or fall under the authority of the National Prohibition Act. The authorization of warrants of search and seizure under the Internal Revenue Laws and Sections 3340 and 3450 of the Revised Statutes (Comp. St. SS 6146, 6352), dealing with the forfeiture of property, are solely in aid of the collection of taxes. But the so-called tax imposed by Section 608 of the Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, S 6144 bb), re-enacted in 1921, is clearly a penalty and not a tax. The decisions of the Supreme Court are conclusive as to this. *Helwig* vs. *U. S.*, 188 U. S. 605, 23 Sup. Ct. 427, 47 L. Ed. 614; *Lipke* vs. *Lederer*, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061; *Regal Drug Corportation* vs. *Wardell*, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. 318."

U. S. vs. *2,615 Barrels, supra,* in referring to Section 608 of the Revised Statutes, held as follows:

> "We are clearly of the opinion that for several reasons the provisions of the Internal Revenue Laws do not apply to any of these cases, and that these libels and search warrants must stand or fall under the authority of the National Prohibition Act and the other on violation of the Internal Revenue Laws. Both these counts are called upon by way of punishment of the defendant for the illegal manufacture and sale of the intoxicating beverages recited. This will not be sustained."

The taxes referred to in Sections 600-A and 608 of the Revised Statutes which were repealed by the National Prohibition Act, as held in the *Yuginovich* case decided by this Court and which were reenacted by the Willis-Campbell Act of November 23rd, 1921, does not necessarily mean that the taxes which were in effect prior to prohibition, now may be considered as taxes.

III.

Section 3257 of the Internal Revenue Laws, and Section 25, Title II, of the National Prohibition Act, are in direct conflict, and under the Willis-Campbell Act, a prosecution if the two laws conflict, must be brought under the National Prohibition Act.

Section 3257 which is the basis for count 2 of the libel.

Section 25 of Title 2 N. P. A., provides as follows:

> "It shall be unlawful to have or possess any liquor or property designed for the manufac-

ture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the Court shall otherwise order. No such warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to conclude the room or rooms used and occupied, not transiently but solely as a residence in an apartment house, hotel, or boarding house.

The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

If section 25 of Title 2, N. P. A., and 3257, are in direct conflict, then under the Willis-Campbell Act, 3257 remains repealed. Both sections refer to liquor. Both sections refer to personal property, and although the word, "property" is used in Section 25 of Title 2, personal property is meant for the reason that refer-

ence is made to a replevy of said property. Under Section 25, a seizure must be made by means of a search warrant, and under Section 3257, no search warrant is required to seize the personal property contained in the Distillery.

Under Section 3257, the property seized and forfeited, become confiscated to the Government, and in addition thereto, the person who carries on the Distillery subjected to a fine and imprisonment. No such provision is made in Section 25 of Title 2. On the contrary under Section 25 of Title 2, the liquor or property seized is subject to the disposition of the Court, only. A discretionary power is vested in the Court to dispose of the property, as the best interests of justice may require. Under Section 3257 of the Revised Statutes, the property becomes confiscated to the Government, and can be sold by the Government. Under Section 25 of Title 2, the property seized which was designed for the unlawful manufacture of liquor, must be destroyed, unless the Court otherwise orders. These two sections undoubtedly are in direct conflict and using the same line of reasoning, as contained in the *Commercial Credit Co.* vs. *The United States, infra,* it would appear that if any proceeding at all was taken by the Government, it was compelled to act under Section 25 of Title 2, instead of Section 3257.

In *Commercial Credit Co.* vs. *U. S.*, 276 U. S., page 226, decided on February 20th, 1928, this Court, analyzing the Internal Revenue Law under which a vehicle was forfeited, and Section 26, Title 2 of the National Prohibition Act which also provides for forfeiture of

vehicles, held that an essential distinction existed between the two sections, and dismissed the libel, on the grounds that there was a direct conflict between the two sections.

In *United States* vs. *63,250 Gallons of Beer,* 13 Fed. (2d), p. 242, Section 25 of Title 2 was construed to refer to personal property only, and not to realty. The court said in part:

> "'Section 25 of the National Prohibition Act is to be read in connection with the Espionage Act, which it incorporates. It relates to property which is movable, and can be disposed of as movable property by destruction or return, and which could be made the subject of replevin proceedings. Real estate and things annexed to real estate are not within its purview, but are to be dealt with under Section 22 of that act, in connection with the use of the premises.'
>
> "The same conclusion has been reached in other jurisdictions. See *Mellet & Nichter Brewing Co.* vs. *U. S.* (D. C.), 296 F. 765; U. S. *vs.* American Brewing Co. (D. C.), 296 F. 772-777."

IV.

Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws are in Direct Conflict.

Section 3281 provides for the forfeiture of real property and for the forfeiture of any interest that a person may have in the lot or tract of land on which the Distillery is situated who knowingly permitted such acts to be done as to defraud or attempt to defraud the United States, of taxes.

Section 22 of Title 2 does not provide for the forfeiture of real property. It is not so drastic as Section 3281. It declares that an action to enjoin a nuisance may be brought where any house, room or building or place is used in violation of the National Prohibition Act, and that the premises may be padlocked. It also provides that leases may be forfeited at the option of the lessor, where the tenant has violated the National Prohibition Act. No provision is made with respect to innocent parties with respect to padlocking the premises. Under Section 22 of Title 2, it makes no difference whether the landlord had knowledge of the violations occurring in his premises. The place may be padlocked, irrespective of his knowledge or consent.

Section 3281 only permits the forfeiture of real property, where there is knowledge and intention on the part of the person with respect to the violations. In other words, under Section 3281 of the Revised Statutes, innocent owners of real property, are apparently protected. Under Section 3281, if the owner of the property did not know that the lessee was committing a crime, his premises cannot be forfeited.

Under Section 22 of the National Prohibition Act, the premises may be padlocked irrespective of the owners or landlord's innocence. There is an apparent conflict therefor, between Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws, and if any proceedings at all were brought, with relation to the real property owned by the Waterloo Distilling Corporation, they should have been brought under the National Prohibition Act, to padlock the premises for a period of one year. Section

3281 of the Revised Statutes cannot be applicable, for the reason that there are no taxes on distilled spirts of which the Government can be defrauded. This apparently is the reason why the drastic punishment of confiscation was not carried over into the National Prohibition Act, and explains the reason for the conflicting penalties provided for in the event a Distiller does not comply with the Laws.

It was held in Re: Crescent Beverage Co., decided August 2, 1923, 297 Fed. p. 1009, that the real property can be seized and disposed of by the Government only as provided for in Section 22 of Title 2. The Court in that case held in part, as follows:

> "The right of the petitioner to conduct its plant had been recognized by the Bureau of Internal Revenue, and hence the seizure of its building, machinery and product in course of manufacture had no lawful foundation whatsoever. But, even if a proper foundation for a seizure had existed, the seizure of the premises could not properly be made by virtue of a search warrant, Section 22, Title 2 of the National Prohibition Act (Comp. St. Ann. Supp., 123, S. 10138½*k*), prescribes the method by which the brewery premises may be taken from the possession of the owner. Section 25 of the same act (Comp. St. Ann. Supp. 1923, S. 10138½*m*), and Title II of Public Law No. 24 of the 65th Congress, approved June 15, 1917 (40 Stat. p. 228 Comp. St. 1918, Comp. St. Ann., Supp. 1919, S. 10496½ a et sez), prescribed the practice after seizure upon search warrant, and was not observed in the present case. We are of the opinion that the seizure of the premises, ma-

> chinery and product in course of manufacture was without warrant of law, and think it is our duty in the premises to make an order for the return thereof."

Again the same conclusion was reached in U. S. vs. 63,250 Gallons of Beer, 13 Fed. (2d) p. 242, wherein the Court also stated, that real estate is not within the purview of Section 25 of the National Prohibition Act, but must be dealt with under Section 22. Both cases above quoted, were decided subsequent to the enactment of the Willis-Campbell Act on November 23rd, 1921, and the Courts held in both cases, that the National Prohibition Act must be followed, in the event any proceeding is taken with reference to the forfeiture of real or personal property.

V.

The Waterloo Distilling Corporation having been indicted and convicted together with others for conspiracy to violate the National Prohibition Act, penalties or suits for forfeitures because of said violations must be pursued under the National Prohibition Act on the theory that the Government having elected to indict and convict for violation of the National Prohibition Act is barred from making any further prosecutions under the Internal Revenue Laws.

The Waterloo Distilling Corporation Was Convicted for Violating the National Prohibition Act

The Waterloo Distilling Corporation, together with several other defendants, was indicted by the

Grand Jury of the United States at a Term of the District Court of the United States for the Western District of New York, for conspiracy to violate the terms of the National Prohibition Act, and the defendant corporation was found guilty of such violations and directed to pay a fine of $10,000.00 on June 2, 1928. The indictment against the defendant reads in part as follows, to wit, that the defendants

> "Knowingly, wilfully, unlawfully and feloniously did conspire, combine, confederate and agree together and with one and another and each with the other, and with divers other persons to said Grand Jurors unknown,—to wit; to knowingly, wilfully, unlawfully and feloniously violate the terms and provisions of an Act of Congress of October 28th, 1919, entitled an act to prohibit intoxicating beverages and to regulate the manufacture, production and use and sale of high proof spirits for other than beverage purposes and insure an ample supply of alcohol and promote the use in scientific research and in the development of fuel, dye and other lawful industries, *the title of which Act of Congress is 'National* Prohibition Act', and which act of Congress is commonly known as *'The Volstead Act'*, in that they would manufacture, possess, keep, barter, sell, transport, deliver, distribute, accept and receive intoxicating liquor and distilled spirits to wit, alcohol for beverage purposes, which said alcohol would then and there contain more than one-half of one per cent of alcohol by volume and would then and there be fit for use for beverage purposes, and specially denatured alcohol would then and there

> contain more than one-half of one per cent of alcohol by volume, contrary to and *otherwise than as authorized by the said National Prohibition Act.* * * *"

The Federal Court in charging the jury that tried the within defendant and the other defendants on the indictment above referred to said in part as follows:

> "So that this alleged conspiracy with which the defendants are charged, is a conspiracy, or an agreement made between them, *as it is claimed, to violate this United States law*, that is, the law, *the National Prohibition Act*, which provides for the manufacture and use and distribution of alcohol."

The Government in its brief in the criminal action in which the WATERLOO DISTILLING CORPORATION was found guilty of conspiracy to violate the National Prohibition Act, specifically referred to various sections in the National Prohibition Act, which were violated. The sections referred to in the National Prohibition Act, were Section 4 of Title 2 (Section 13, Title 27 U. S. C.), Section 29, Title 2 N. P. A. (Section 46, Title 27 U. S. C.), Section 15, Title 3 N. P. A. (Section 85, Title 27 U. S. C.), Section 13, Title 3 N. P. A. (Section 83, Title 27 U. S. C.).

Section 4 of Title 2 provides that denatured alcohol when produced and used as provided by law, shall not be subject to the provisions of the National Prohibition Act. Section 29 provides for a penalty of $500.00 whoever falsifies records.

Section 15 of Title 3 of the National Prohibition Act provides as follows:

> "Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation."

THE PROPERTY, BOTH REAL AND PERSONAL, OF THE DEFENDANT, WAS LIBELLED UNDER THE INTERNAL REVENUE LAWS (the Sections having been enumerated heretofore).

All Sections of the Revised Statutes above enumerated are statutes under Internal Revenue Laws and were in existence and in effect prior to the enactment of the National Prohibition Act.

Under the Act of March 3, 1927, Congress gave the Secretary of the Treasury the right to transfer from

the Collector of Internal Revenue to the Prohibition Commissioner all the rights, privileges, powers and duties heretofore imposed on the Commissioner of Internal Revenue by any law in respect of the taxation— or any other law relating to the enforcement of the Eighteenth Amendment.

Under Treasury Decision No. 1, the Secretary of the Treasury, pursuant to said Act of March 3, 1927, did transfer the powers heretofore imposed on the Collector of Internal Revenue to the Prohibition Commissioner only insofar as said duties and privileges applied to the enforcement of the National Prohibition Act, so that under the present laws and treasury decision the powers and duties heretofore imposed on the Collector of Internal Revenue now vest with the Prohibition Commissioner. *The question that arises is whether the Prohibition Commissioner has the right to invoke the Internal Revenue Laws to forfeit the property of the defendant where the defendant had previously been convicted and punished for violating the National Prohibition Act.*

Whether the Government has the power to proceed under either the Internal Revenue laws or the National Prohibition Act depends whether or not both laws are operative and run side by side and do not conflict. Subsequent to the enactment of the National Prohibition Act it was held that all Internal Revenue laws with regard to violations of manufacture and taxation of and traffic in intoxicating liquor had been superseded by the National Prohibition Act. (*United*

States vs. *Yugenovich*, 256 U. S. 450, decided June 1, 1921.)

On November 23rd, 1921, it was enacted that all prior Internal Revenue laws with regard to the manufacture and taxation of and traffic in intoxicating liquors were to continue in force except such provisions of such laws as are in direct conflict with the National Prohibition Act. The enactment is now Section 3 of Title 27 of U. S. C. A. and is as follows:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, *except such provisions of such laws as are directly in conflict with any provisions of this title;* but if any act is a violation of any such laws and also of this title, a conviction for such act or offense *under one shall be a bar to prosecution therefor under the other.*" (Nov. 23, 1921, c. 134, S. 5, 42 Stat. 223.) (Italics ours.)

The first question then as to whether or not the Government had the power to proceed to forfeit the property of the defendant under the Internal Revenue laws must be determined on the question as to whether or not said Internal Revenue Laws are in *conflict* with the National Prohibition Act.

The Willis-Campbell Act is clear and mandatory. It leaves no room for discretion on the part of the Prohibition Commissioner. If the Internal Revenue Laws

are in *conflict* with the National Prohibition Act, then the penalties to be inflicted on any violators must be those penalties as provided for in the National Prohibition Act and not the Internal Revenue laws.

On the other hand, if any part of the National Prohibition Act has been infringed upon or *violated*, subsequent prosecutions must be made by the Government, if made at all, under the National Prohibition Act.

This Court has considered this question in *Commercial Credit Company* vs. *United States of America*, 276 U. S. 226, decided on February 20, 1928. In that case a libel was brought by the United States under Section 3450 of the Revised Statutes of the Internal Revenue Laws to forfeit an automobile used in the removal, deposit and concealment of intoxicating liquor with the intent to defraud the United States of tax.

The doctrine of the Court was predicated upon the theory that the National Prohibition Act was in *conflict* with the Internal Revenue Laws. Adopting the same standing in the case at bar the Government likewise was barred from proceeding under the Internal Revenue Laws to bring the within libel for the reason that the Internal Revenue Laws are in conflict with the National Prohibition Act with regard to forfeiture of property.

The libel in the within case should have been dismissed on the following grounds:

1. That the provisions relating to penalties and forfeitures as incorporated in the National Prohibition

Act are in conflict with the Internal Revenue Laws, and

2. The WATERLOO DISTILLING CORPORATION having been prosecuted criminally under the National Prohibition Act, the Government is deemed to have elected the remedies it would pursue and is barred from bringing a forfeiture proceeding under the Internal Revenue Laws. (See Sec. 3 of Title 27 of U. S. C. A.)

The records which are on file in this Court show a prior conviction of the National Prohibition Act as outlined in the indictment and charge of the Court.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *La Franca* vs. *United States of America*, decided that a criminal conviction under the National Prohibition Act, constitutes a complete bar to a subsequent prosecution, either civilly or criminally. This case was decided January 7th, 1930, and is now before this Court.

In *United States* vs. *Goldman*, 28 Fed. (2) 424, the defendants therein were indicted for conspiracy to violate the National Prohibition Act. Two of the defendants interposed a plea in bar, claiming immunity under Section 30, Title 2 of the National Prohibition Act, which provides that witnesses who testified in obedience to a subpoena shall not be subjected to any penalty or forfeiture, etc. The Government in that case demurred to the plea in bar contending that the prosecution was for conspiracy to violate the National Prohibition Act and not to violate the National Prohibition Act itself, and therefore the plea in bar could

not be invoked. The court held that the defendants could properly claim immunity because of the National Prohibition Act even though the charge was for a *conspiracy* to violate the National Prohibition Act and not for a violation of any part of the Act itself.

VI.

In any event, denatured alcohol is tax-free and there can be no forfeiture for alleged non-payment of tax on alcohol, after it is denatured.

> "The purpose of Title 3 of the National Prohibition Act, was to remove a number of restrictions placed on the manufacture of industrial alcohol that are deemed unnecessary, and to permit the Commissioner to substitute Regulations with the view of encouraging this very essential industry. 58 Congressional Record, 2293."

Title 3 of the National Prohibition Act was therefore drafted, so as to encourage the industries in which industrial alcohol is used.

Regulation 3 which went into effect August, 1927, were Regulations promulgated pursuant to Title 3, which relates to industrial alcohol.

Even prior to prohibition, Sections 481 and 482 of the Internal Revenue Laws provided that denatured alcohol was tax-free.

By Sections 481 and 482 of Title 26, we see that even in the years 1906 and 1907, alcohol when withdrawn for denaturization, was tax-free and became

tax-free after being distilled. The same principle is carried into the National Prohibition Act and the Regulations as above set forth.

Conclusion.

As this case involves questions of national importance in relation to the forfeiture and destruction of real and personal property, and for the other reasons mentioned herein, they are the proper ones for a review by this Court. The petition for the writ should therefore be granted.

Respectfully submitted,

LEWIS LANDES,
Solicitor for Petitioners.

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